82-2004

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No.

DARFRENTE TUASON NIBUNGCO, JR.

Petitioner

- vs -

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Third Circuit erred in not reversing the U. S. District Court for failing to find that the Petitioner, although a doctor, was not a Quota Immigrant, both a mistake of law and of fact.

2. Whether the U. S. Court of Appeals erred in not reversing the U. S. District Court in failing to find that there was no unlawful nor fraudulent entry by petitioner who came on a non-immigrant visa.

3. Whether the United States Court of Appeals for the Third Circuit erred in not reversing the U. S. District Court for failing to find that defendant's omission of his medical background was immaterial to his application for a non-immigrant

visa.

4. Whether the United States Court of Appeals erred in not reversing the U.S. District Court in failing to find that the position of salesman by the defendant was the material fact.

5. Whether the United States Court of Appeals for the Third Circuit erred in failing to find that the U. S. District Court was in error in refusing to instruct and illustrate to the Jury the exceptions and factors which would negate the intent element of fraud.

6. Whether the petitioner was deprived of life, liberty and due process of law by the United States Court of Appeals in affirming the United States District Court decision finding defendant guilty without sufficient evidence.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1 - 11
AUTHORITIES CITED	iv - v
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	42
APPENDIX	43
Copy of Transcript Denying Motion To Dismiss	A-1
Copy of Transcript Showing Side Bar Conference	A-2 & 3
Copy of Transcript Showing Judgment	A-4 - 5
Copy of Notice of Appeal	A-6 - 7
Copy of Judgment of U.S. Court of Appeals	A-8-9-10
Copy of Denial by U. S. Court of Appeals of Petition For Rehearing	A-11
Copy of Indictment	A-12-13
Copy of Transcript	A-14
Copy of Transcript	A-15
Copy of Transcript	A-15
Copy of Transcript	A-16
Copy of Administrative Manager's Letter to U. S. Embassy Inquiry	A-17
Copy of Notarized Signature of U. S. Vice-Consul Authenticating Signature	A-18

AUTHORITIES CITED

	Page
Qureshi v. Immigration and Naturalization Service 319 F 2d 1174 (C. A. Gu. 1975)	27
U.S. v. Campos-Serrano 430 F.2d 173.. (C.A. 111. 1970) Aff. 404 U.S. 293, 92 S. Ct. 471 (1970) cert. den 404 U.S. 1023 92 S. Ct. 686 (1972)	27
U.S. v. Rubenstein 151 F. 2d 915 .... (2d Cir. 1945)	28
U.S. v. Uram 148 F. 2d 187, 190 ..... (2d Cir. 1945)	28
U.S. v. Kenny 236 F. 2d 128 ..... (3rd Cir. 1956)	28
Lutwak v. U.S. 344 U.S. 604, 611-612. 73 S. Ct. 481 (1953)	28
U.S. ex rel Teper v. Miller ..... 87 F Supp. 285 (1949)	28
U.S. v. Flores-Rodriguez ..... 237 F2d 405 (C.A.N.Y. 1956)	28
U.S. ex rel Janhowski v. ..... Shaughnessy 180 F.2d 580 (C.A.N.Y. 1951)	29
U.S. ex rel Fink v. Reimer ..... 96 F.2d 217 (C.A.N.Y. 1938) Cert. den. 305 U.S. 618, 59 S. Ct. 78 (1938)	29

Page

U.S. v. ex rel Di Coslanzo..... 29
v. Uhl 6 F Supp 791 (1948)

In Petition For Naturalization... 30
of Roselle Field, 189 F.
Supp 44 (DC NY, 1958)

U.S. ex rel Leibowitz v. 31
94 F. 2d 263 (7th Cir 1938)

U.S. ex rel Sorio v. Day 32
34 F. 2d 920, 921 (2d Cir.
1929)

U.S. ex rel Lamys v. Corsi 32
(2d Cir 1932)

Paul Ching-Szu Chen v. Foley 33
385 F. 2d 929 (C.A. Tenn
1967) Cert. den 89 S. Ct
115, 393 U.S. 838 (1968)

Faddah v. I.N.S. 553 F 2d 491.... 34
495 (5th Cir. 19-7)

Brownell v. Carija, 254 F.2d 78.. 34
(D.C. Cir. 1957); Choy
v. Barber 279 F.2d 642
(9th Cir. 1960); Matter of
H.R., 7 IN 651 (1958); Mat-
ter of Chartier 16. IN
(I.D. 2602, 1977)

Lutwak v. U.S. 344 U.S. 604 40
611-612 73 S. Ct. 481
(1953)

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

DARFRENTE TUASON NIBUNGCO, JR., the petitioner herein, prays that a writ of cer-

tiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 25, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported. The judgment of the United States Court of Appeals for the Third Circuit is presented in Appendix A-8-9 hereto infra, page 50. The Transcript of the Judgment of the United States District Court for the Western District of Pennsylvania is printed in Appendix A-4 hereto, infra, page 47.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A-8-9. infra, page 50 was entered on January 25, 1983. A timely petition for rehearing

was denied on February 23, 1983. (Appendix A-11, p 53). The jurisdiction of the Supreme Court is invoked under 28 U.S.C.S. 1254 (1).

STATUTES INVOLVED

1. The Immigration and Nationality Act of 1952 (Sec. 214 (b), 8 U.S.C. 1184 (b) which states in part:

> Every alien seeking to enter the United States is deemed an immigrant, unless he establishes that he is a non-immigrant. A non-immigrant is one who establishes that he seeks to come temporarily and includes foreign government officials, visitors, aliens in transit to other countries and treaty traders..

2. 8 U.S.C. 1101, 1101(A) (1b), 1151, 1153, 1154, 1184, 1202, 18 U.S.C. 1546.

3. Fifth Amendment of the U. S. Constitution - "No person shall be ... deprived

of life, liberty ... without due process of law ..."

STATEMENT OF THE CASE

This petition concerns important questions regarding defendant's status under the immigration laws of the United States and his change of status after entry into the United States.

On October 18, 1981, Darfrente Tuason Nibungco, Jr. was indicted under 18 U.S.C. 1546.

The Bill of Indictment specifically charged that defendant gained entry into the United States as a non-immigrant under a visitor's visa when in fact he was a quota immigrant. The indictment additionally alleged that defendant concealed his medical background, and falsely stated that he was a

salesman and intended ab initio to remain in the United States permanently. All of the above, the indictment alleged, constitute fraudulent and unlawful entry into the United States.

On January 6, 1982 defendant filed a motion to dismiss and motion for change of venue with a supporting brief. Defendant argued the following as a matter of law and on the facts:

1. The indictment did not state facts sufficient to constitute an offense against the United States since defendant did not obtain his visa by means of false statements. Further, his claims of being a salesman were true.

2. Defendant had no legal duty to disclose his M.D. degree and his failure to do so did not consti-

tute concealment of material fact.

3. Defendant was not a quota immigrant as erroneously stated by the government in the indictment.

4. Defendant did not have any intention of obtaining employment in the United States when he applied for his visa at the American Consulate in Manila.

On January 12, 1982 the Government filed a response to defendant's motion.

On May 10, 1982, the Honorable Gustave Diamond of the United States District Court for the Western District of Pennsylvania denied defendant's motion to dismiss and motion for change of venue. The matter then proceeded to trial by jury. (See T Copy p. 43 ; Appendix A1)

At trial, defendant excepted at side

bar to the trial judge's jury instruction with regard to the element of intent. (See TRANSCRIPTS pp. 44-45 ; Appendix A2 & A3)

On May 15, 1982 the jury returned a verdict of guilty as charged under 18 U.S.C. 1546. A notice of appeal was filed on July 6, 1982. (See TRANSCRIPT p.46-47; Appendix A4-5 Notice of Appeal; A 6-7). The United States Court of Appeals affirmed the Lower Court's decision in its judgment order dated January 25, 1983. (Appendix A-8-10), a timely petition for rehearing was denied by the same court on February 23, 1983, (Appendix A-11)

Hence, we are filing this petition for a Writ of Certiorari.

The petitioner was a sub-agent for the Delta Motors Corporation in the Philippines who entered the United States as a visitor to visit his girlfriend and see the fabled tourists spots and the beautiful sights in

America. He applied for a temporary visitor's visa; he never sought entry to the United States as a quota immigrant.

The application process for the visitor's visa involved an interminable wait with a queue of people awaiting their turn to go past the gates and into the American Consulate in the Philippines. (During this time the Philippines was under Martial Law, probably explaining why so many people wanted to get out of the country.) Upon entering the offices, the defendant was assailed by a barrage of noise emanating from the jostling crowd seeking information. It was against this backdrop that the defendant obtained his application form for a visitor's visa.

Defendant, in filling out his application, did not allude to his residency training in medical school, or his medical education since the Consulate officials did not

directly question him on the topic either in written or oral form. When questioned about his occupation, defendant correctly informed the Consular Officers that he was a sub-agent for a car dealership.

REASONS FOR GRANTING WRIT

1. The United States Court of Appeals erred in not reversing the United States District Court for failing to find that petitioner was not a quota immigrant since he never applied for an immigrant visa.

The Indictment charges defendant that:

1. On or about August 5, 1979, in the Western District of Pennsylvania, at Pittsburgh, Pennsylvania, DARFRENTE TUASON NIBUNGCO, JR. defendant herein, unlawfully and knowingly filed an application for extension in the United States of America as a non-immigrant visitor, and, in so doing, used and attempted to use a visa and document which was required for entry into the United States of America and which he had

knowingly, fraudulently, and unlawfully procured by means of false claims and statements, to wit:

On or about July 6, 1979, at the American Consulate, Manila, Philippines, the defendant applied for and unlawfully and knowingly obtained, accepted, and received a non-immigrant visa by falsely claiming that he was a salesman with his highest completed education being a Bachelor of Science degree, that he wished to visit the United States of America for one-month and that based thereon, he was a non-immigrant when in truth and in fact as defendant well knew, he was a physician with a degree as a Medical Doctor, that he intended to obtain employment in the United States of America as a doctor and that based thereon at the time he, a native of the Philippines, was a quota immigrant who was not entitled to enter, be or remain in the United States of America under a non-immigrant status.

In violation of 18 United States Code 1546. (See Appendix 12-13)

The government alleges that, in spite of the fact that the defendant gained entry into the United States of America on a non-immigrant visa, he was in fact a quota immigrant. According to the Government, as set

forth in the indictment, a quota immigrant status is based on the defendant's medical background. Defendant, the government contends, fraudulently used the immigration process to get into the United States by applying for a non-immigrant status when, in fact, he was a quota immigrant. This is incorrect as a matter of law and constitutes grounds for dismissing the indictment and reversing the lower Court conviction.

Additionally, the government contends that defendant, by falsely claiming as a salesman, fraudulently obtained a non-immigrant visa. This assessment is unsupported by the law and facts and will be addressed later in the brief.

A discussion of the immigration laws pertinent to the case at hand is now in order. A complete and correct understanding of the distinction between quota immigrant status and a non-immigrant status as well as the require-

ments and procedures for obtaining the above-mentioned status is essential in order to arrive at a legally correct decision. A failure to fully understand the relevant immigration laws resulted in the errors below and brought about the appeal and now the petition for Certiorari.

Aliens may enter the United States on the basis of immigrant or non-immigrant status. If the alien seeks entry by immigrant status, he must file a petition with the Attorney General and claim a specified preference classification status, 8 U.S.C. 1154. There are seven preference quota categories, namely:

(a) First Preference - Unmarried sons and daughters of U. S. citizens.

(b) Second Preference - Spouses and unmarried sons and daughters of aliens who have been lawfully admitted into the United States as a permanent residents.

(c) Third Preference -Members of the professions or persons of exceptional ability in the sciences and arts.

(d) Fourth Preference - Married sons and daughters of United States citizens.

(e) Fifth Preference - Brothers and sisters of United States citizens who are twenty one years of age or older.

(f) Sixth Preference - Skilled and unskilled workers in short supply.

(g) Non Preference - Members not used by the six preferences.

It may be pertinent at this juncture, to mention that with respect to immigrant visas, there is a sub-category of non-quota immigrant status. Those falling under this status are parents, spouse, and children of U. S. citizens, where there is no quota allocation because their visas are immediately available.

Federal authorities are empowered by

Congress to set numerical limitations on the number of the total lawful admissions permitted into the United States on a quarterly or yearly basis. 8 U.S.C. 1151. Although admission is determined by a controlled selection system, no discrimination may be permitted on the basis of race, sex, national origin, place of birth, or place of residence. Id.

In the case at hand, it has been asserted by the government officials that the defendant has knowingly and intentionally subverted the preference immigration status of the Third category and gained unlawful entry by a visitor's visa. In contrast, the defendant rightfully asserts legal entry by the non-immigrant status of a visitor's visa. Thus, an indepth analysis of the two methods of entry is appropriate.

Section 8 U.S.C. 1153 specifically characterizes those persons in the Third Pre-

ference Immigrant Status Category:

> " . . . immigrants who are members of the professions or because of their exceptional ability in the science or the arts will substantially benefit prospectively the national economic, cultural interests or welfare of the United States and whose services in the professions, sciences or arts are sought by an employer in the United States."

The number of aliens who may be admitted to the United States by means of the Third Preference is a maximum of ten percent of the overall entry limitations. Further, the candidates pursuing Third Preference admission must meet other requirements. A labor certification and job offer must be secured upon application for admission. The labor certification must show evidence that (a) there are not sufficient United States workers at the place the alien seeks to work, and (b) the alien's employment will not adversely affect

the working conditions of similar American workers. The alien must complete four copies of a Job Offer for Alien Employment from the Prospective United States employer. The forms are then reviewed by the Department of Labor which may then grant labor certification. At this point, the employer can file a visa petition with the Immigration and Naturalization Service. Once the visa petition is granted, the Notice of Approval of Visa Petition is forwarded to both the employer and the American Consulate abroad. Finally, the alien may file the Applicaqtion for Immigrant Visa and Alien Registration.

A mere surface analysis of the procedural requirements for entry by Third Preference Immigrant Status reveals a timely and well regulated process of entry. An alien seeking entry under such preferential status must make a determined conscious decision to take this detailed route of entry. He must be willing

to divest himself of ties with home and hearth, declare himself an immigrant, comply with application requirements and lastly be granted approval. The alien must vigorously and affirmatively break substantial ties with his fatherland and be accepted by federal immigration authorities for entry (8 U.S.C. 1202.)

The alien may temporarily and initially be introduced to this country by a visitor's visa but contemporaneously may change his status or seek more lasting stay by preference immigration status.

The statute 8 USC 1101 (a) (15) defines an immigrant as "every alien except an alien who is within the specified classes of non-immigrant aliens." Hence, an alien may enter the United States as a non-immigrant. Mr. Hallowell a government witness, admitted this during the trial. On page 83 of the transcript, he states, "There are some non-immigrant categories in which a person may

come to the United States." Mr Hallowell admitted that if the alien does not file an application for the Third Preference Immigrant Status, he is not a quota immigrant. (Page 56 copy of the transcript. A14)

In the indictment, the government asserts in part that:

> he wished to visit the United States of America for one month based thereon, he was a non-immigrant when in truth and in fact, as defendant well knew, he was a physician with a degree as a Medical Doctor, that he intended to obtain employment in the United States of America as Doctor and that based thereon at that time he, a native of the Philippines, was a quota immigrant, who was not entitled to enter, be or remain in the United States under non-immigrant status.
>
> In violation of 18 United States Code, Section 1546.

The government is prosecuting the defendant as a quota immigrant and attached status to him merely because he is a physician. An error, since that is not the law

because, as Mr. Hallowell has admitted, if the alien does not file an application for Third Preference he is not a quota immigrant.

Since, by the terms of the indictment, the defendant is being prosecuted as a quota immigrant, who falsely and fraudulently entered the United States as a non-immigrant, and the fact is he is not a quota immigrant, the lower court erred and its decision should be reversed.

Concededly, if the defendant has applied for and been assigned the status of quota immigrant by a duly appointed INS official and then proceeded to apply for non-immigrant status and intentionally concealed his education as a doctor, as requested in the application, then, it is submitted, such information becomes material and the intentional withholding of such information to mislead the interviewing officer

would probably constitute fraud.

This is not the case at bar. Defendant never applied for immigrant status, does not have an approved immigrant application for immigrant status, and hence, not a quota immigrant. When he went to the U.S. Embassy in Manila, he applied only for non-immigrant visa to visit the United States. Not having a prior approved immigrant visa application, his being a doctor was not a material information to his application for a visitor or non-immigrant visa. The government correctly stated that a quota immigrant from the Philippines is not entitled to enter or remain in the United States under non-immigrant status. But it erred in describing defendant as a quota immigrant. Because a quota immigrant must first apply and obtain an approved petition to be classified as a quota immigrant. Defendant, however, has not applied and does not have an approved immigrant visa to the

United States.

This is where the position of the Government falls. It premises its Indictment on the assumption that defendant, as a doctor is a quota immigrant, and as such, his failure to disclose his position as a doctor was a material fact and if this information were presented, the American Consulate in Manila would have denied his application for a visa. But defendant is not quota immigrant, having never applied for such visa. Therefore, his being a doctor does not bar him from entering the United States as a non-immigrant and does not disqualify him from applying for a non-immigrant visa.

Since defendant was only applying for a tourist visa, obtainable irrespective of his educational attainment, and the application form did not require him to state his highest education completed, it is unwarranted to conclude that a knowing, willful

and criminal intent was present when defendant presented his application at the American Consulate in Manila, Philippines, with his failure to state his medical degree.

2. The United States Court of Appeals erred in not reversing the United States District Court for failing to find that there was no unlawful nor fraudulent entry by petitioner who came on a non-immigrant visa.

Entry by non-immigrant status is another means of entry. Yet, certain requirements must be met. The alien must declare himself to be a non-immigrant, declare such status upon application and be approved for only a temporary stay. A non-immigrant is an alien who is "allowed temporary admission under a policy of promoting good relations among the peoples of the world," 8 U.S.C. 1101 (a) (15). This alien has a "residence in a foreign country to which he has no intention of abandoning and who is visiting the United States temporarily on business or

temporarily for pleasure," 8 U.S.C. 1101 (a) (15). Furthermore, evidence substantiating the purpose of the trip must be outlined. If visiting for pleasure, the candidate must in detail set out planned visits and his intention to return home. A job and permanent residence both indicate the alien's intention to return home. Unlike the immigrant status, the non-immigrant or visitor's status does not require a dramatic severance of homeland ties. The application and procedure for a visitor's visa for temporary stay is quite different from Immigrant Status application. The alien must affirmatively apply for non-immigrant status and fulfill the requirements of 8 U.S.C. 1184 and applicable regulations. The purpose and procedure of the two types of entry are divergent.

Defendant's intention to enter the United States as a non-immigrant is supported

by the evidence: Firstly, upon leaving the Philippines for a temporary visit to the United States, defendant did not resign his position with the Delta Motors Corporation; Secondly, defendant did not resign his uncompensated residency with the Philippine General Hospital. Defendant had spent many years studying medicine in the Philippines and was in the 3rd year of his residency. It was, therefore only logical to say that defendant's intention at the time he applied for a non-immigrant visa was, at the expiration of his four-week visit to the United States, to return to the Philippines, continue his residency and later pursue his medical practice; thirdly, the defendant did not carry his medical credentials when he entered the United States as a non-immigrant. The credentials were mailed to the United States three weeks after his initial entry when defendant decided to adjust his status. Under Section 245 of the Immigration and

Naturalization Laws an immigrant or non-immigrant may adjust his status. There are exceptions to Section 245, but the defendant does not fall within the enumerated exceptions of the Code.

On direct examination, the defendant was asked:

> "So now tell the jury approximately, is it on the second or third week that you had this serious discussion? (regarding extension of stay in the United States). Was it in the second or third week?" (See A-15-P-57 line 21-25)

Defendant, unsure of the exact point the decision was made, responded, "I believe that's the third week, I think." (Copy of transcript page 57 ; Appendix A15).

The Government case is built solely on circumstantial evidence which is contradicted squarely by the above stated facts which support the conclusion that it

was defendant's intention to enter the United States as a non-immigrant. Only later did he formulate the intent to remain in the United States beyond the four-week period.

The jury was asked to infer that defendant had a present intention to remain permanently in the United States on the basis of the ten-year waiting for quota immigrants, economic advantages of living in the United States, the temporary residency of defendant's girlfriend in the United States, and defendant's failure to give an absolutely accurate description of his employment in the Philippines. These inferences are contradicted by the facts stated above.

3. The United States Court of Appeals erred in not reversing the Lower Court in failing to find that defendant's omission of his medical background from his non-immigrant

visa application was not a material fact.

According to 18 U.S.C. 1546, any alien who "knowingly forges, counterfeits, alters or falsely makes any immigrant or non-immigrant visa, permit or other document required for entry into the United States ... shall be fined not more than $2,000 or imprisoned not more than five years, or both." The purpose of the statute is to provide punishment "Making false statements under oath with respect to a material fact or any application." Qureshi v. Immigration and Naturalization Service 319 F2d 1174 (CA ga 1975). See U.S. v. Vargas 380 F Supp 1162 (DC NY 1974); U.S. v. Campos-Serrano 430 F2d 173. (CA 111. 1970) affirmed 404 U.S. 293, 92 S Ct. 472 (1970) cert den 404 US 1023, 92 S Ct. 686 (1972). The "false representation, like common law perjury, requires proof of actual falsity; concealment requires proof of willful nondisclosure by

means of a 'trick, scheme or ruse.'" U.S. v. Rubenstein 151 F2d 915 (2nd Cir. 1945); cert den 326 U.S. 766, 66 S Ct. 168. See U.S. v. Uram 148 F2d 187, 190 (2d Cir 1945); U.S. v. Kenny 236 F2d 128 (3rd Cir 1956). The alien must possess a conscious objective to misrepresent the "true state of affairs," Lutwak v. U.S. ... 344 U.S. 604, 611-612, 73 S. Ct. 481 (1953).

The facts misstated must be material to justify an assertion of fraud. To test materiality the Court must determine whether the fact suppressed or misstated if known would have justified refusal to issue the visa. U.S. ex rel Teper v. Miller 87F Supp. 285 (1949). In U.S. v. Flores-Rodriguez 237 F2d 405 (CA N.Y. 1956), the defendant in applying for entry documents failed to reveal that he was convicted of "loitering about in a public place soliciting men for the purpose of committing a crime against

nature ..." The Court held that such non-disclosure was material since it would have led to an inquiry as to excludability "as a person of constitutional psychopathic inferiority." Id. In U.S. ex rel Janhowski v. Shaughnessy 180 F. 2d 580 (CA NY 1951) the alien concealed the fact that he had been arrested and imprisoned in England for two years. The Court held that the "misrepresentation and concealment were material and had facts been disclosed they could have been enough to justify refusal of a visa. Id. See U.S. ex rel Fink v. Reimer 96 F.2d 217 (CA NY 1938) cert den. 305 US 618, 59 S. Ct. 78 (1938).

In U.S. Ex Rel Di Coslanzo v. Uhl, 6 F Supp 791 (1948), the Court found the defendant to have knowingly and willfully impersonated another. Statements as to the name and identity of the alien are material facts which have a bearing upon the issuance

of entry documents.

Before the alien will be criminally penalized or deported, the Court must find a conscious knowing and willful misstatement which is absolutely material. In Petition for Naturalization of Roselle Field, 189 F. Supp 144 (DC NY 1958), the alien in applying for immigration in the United States knowingly omitted Russia as a place of residence "because she was afraid that the fact of residing in Russia might lead some authorities to believe that she had been a Communist." id at 145. She swore that she was not and had never been a communist. The Court commented that a truthful answer would not have triggered automatic denial of a visa but might have induced the Consul to institute an investigation. Since nothing showed "that any such investigation would have resulted in the refusal of a visa," defendant's entry into the United States was

considered legal. Id at 147.

A distinction between a knowing and willful fraud in the application and a mere misstatement or omission that has no weight in consideration of admission to the United States may be drawn:

> "misrepresentation which enables the immigrant to obtain admission and where such right was not thus dependent. In the former, such misrepresentation has generally been termed a fraud and grounds for deportation, while in the latter, it has been treated as irrelevant and as not constituting such fraud."
> U.S. ex rel Leibowitz v. Scholtfeld 94 F2d 263 (7th Cir 1938).

factor which is irrelevant to the purpose a defendant's application for a visa mply is not material. Thus,

> "It is true that the (applicant) was bound to tell the truth on his application, but if what he suppressed was irrelevant to his admission, the mere

> suppression would not debar him." U.S. ex rel Sorio v. Day 34 F 2d 920, 921 (2d Cir. 1929). See also U.S. ex rel Lamys vs. Corsi 61 F.2d (2d Cir 1932)

In the instant case, defendant did not conceal material facts such as identity, marital status or the conviction of a crime. Instead, defendant omitted a detail of his educational background, his attendance at and graduation from medical school. The purpose of the visitor's visa is the temporary entrance and sojourn in the United States and subsequent return to his homeland, the Philippine Islands. This temporary visitor's visa which the defendant applied for and received had absolutely no connection with his background in medicine or with any employment opportunities whatsoever. The defendant was already employed as a subagent for the Delta Motors Corporation at the time he sought the visa to see the

United States and more importantly to visit his girlfriend. The job with the Delta Motors Corporation was his sole source of employment and income since his residency at the Philippine General Hospital was without the traditional drawing salary. Defendant's present intention at the time of application was his desire to see his girlfriend and view the beautiful sights in America. His level of educational development or medical expertise did not bear upon the reason for his visit and was therefore not material to the issuance of an American visa. The information about medical school and his M.D. degree was totally irrelevant to the evaluation of his present intention and purpose for non-immigrant visitor's status. Federal authorities have not presented sufficient proof to indicate defendant's omission was material and would have prompted the denial of a visitor's visa. Paul Ching-Szu Chen v. Foley, 385 F2d 939 (CA Tenn) cert den 89 S.

Ct. 115, 393 US 838, (1968).

The good faith entry into the United States of an alien is satisfied and not unlawful when the status of an alien changes in the United States. Faddah v. Immigration and Naturalization Service 553 F2d 491, 495 (5th Cir 1977); but a wish to remain here, if an opportunity to do so legally presents itself, is not necessarily inconsistent with lawful non-immigrant status. (Brownell v. Carija, 254 F.2d 78 (D.C.Cir. 1957); Choy v. Barber, 279 F.2d 642 (9th Cir. 1960); Matter of H.R., 7 IN 651 (1958); Matter of Chartier, 16 IN.... (I.D. 2602, 1977) (N.5) (mere hope from the beginning that he would be able to acquire lawful resident status not necessarily inconsistent with lawful non-immigrant status).

The following response was made on a cross-examination by the Government witness:

> Q. Thank you, Mr. Spoede. So, it makes no difference normally with immigration whether he is a lawyer, an engineer or a doctor. If he satisfies these requirements (economic ties, family ties and intent to return to his home country) normally it is approved by the Immigration and Consulate, assuming that he is not approved immigrant applicant?
>
> A. No. Assuming that he can prove to the Consular Officer that he intends to return to the Philippines. (See A-15-T-57, line 3-9)

Thus, being a doctor per se is not the determining factor in the issuance of a visitor's visa. The defendant proved economic and family ties, and a present intent to return to the Philippines - all to the satisfaction of the Consular Officer, who thereupon issued the visitor's visa.

Status as a physician was not material to this particular visitor's visa and therefore its omission does not constitute a fraud.

4. The United States Court of Appeals erred in not reversing the Trial Court in failing to find that the position of salesman by Petitioner was the material fact.

Defendant's employment as a salesman, sub-agent or "bird dog" was material to his entry into the United States on a visitor's visa. He received a substantial income as a salesman, sub-agent or a "bird dog" for the Delta Motors Corporation. Accordingly, defendant listed this fact on the visa application.

The Government witness, Mr. Spoede, a Consular Officer, conceded that financial capacity was a major consideration in issuing a visitor's visa. The following was stated in this regard:

Q. And what were the requirements when the B-2 visa was issued at the time?

A. Well, we have gone through

this several times.

Q. Yes. I want to hear it again.

A. The requirements are in general first that the applicant must satisfy me that he has the intention and the means to visit the United States and return to the Philippines.

In detail, we asked for proof of ongoing employment, a good job to which to return, we looked for sufficient funds to carry out the visit...

Q. But in making that decision, sir, financial capacity is always a very important requirement?

A. Yes. It is one of the major requirements. (See Transcript A-16-T 58 line 9-15)

This exchange illustrated quite clearly that defendant's position as a salesman or "bird dog" was the material fact. Defendant supported himself as a salesman in the Philippines, not as a resident physician.

In describing himself as a salesman for the Delta Motors Corporation, defendant used the word "salesman" in its generic or loose sense rather than in its precise or technical meaning, with an official designation. His claim as a "bird dog" is admitted by the General Manager of the Delta Motors Corporation in reply to the U.S. Embassy inquiry. (See Appendix A17 & 18)

He was a sub-agent and selling cars through the regular salesmen of the Company. He therefore did not lie. He did not make any false claim. Being a doctor, he was not trained in the hair-splitting distinction of business terms. He merely stated his activities, believing honestly that he was a salesman, without further thought whether or not his claim had the stamp of official sanction. The truth of the matter is that he was doing exactly what the salesmen of Toyota Motor Corporation were doing --

selling cars, receiving commission from the said company in the process.

5. The United States Court of Appeals erred in not reversing the Lower Court for refusing to instruct the Jury of the exceptions and factors which would negate the intent element in the charge of fraudulent entry.

Intent is crucial element in the Government charge that defendant committed a fraud against the United States of America thereby gaining entry into this country, which element, the Government must prove beyond reasonable doubt.

According to 18 U.S.C. 1546, any alien who "knowingly forges, counterfeits, alters or falsely makes any immigrant or non-immigrant visa, permit or other document required for entry into the United States... shall be fined not more than $2,000 or imprisoned not more than five years, or both."

The key words are "knowingly, "willful nondisclosure" and "it must be proved beyond reasonable doubt that the alien possessed a conscious objective to misrepresent the true state of affairs." Lutwak v. U.S. 344 U.S. 604, 611-612 73 S.Ct. 481 (1953).

The judge, in instructing and illustrating to the jury as to the detailed meaning of intent, refused to illustrate the exception and its relevance to the case at hand.

If properly instructed, the jury might have considered any number of facts offered at trial to negate the intent element of the charge.

The jury was presented with evidence to the Consulate in Manila, i.e. jostling crowd, a queue, confusion, long waiting period at the Consulate.

The defendant testified that he honestly believed that his status as non-compensated physician was not relevant in obtaining a non-immigrant visitor's visa. An honest mistake would negate the intent element of fraud.

The refusal of the lower court judge to specifically instruct and illustrate to the jury the exceptions which negate the element such as mistake and negligence within the context of the indictment prejudiced the defendant and constitutes reversible error.

6. Petitioner was deprived of life, liberty and due process of law by the United States Court of Appeals in affirming the United States District Court decision finding defendant guilty without sufficient evidence.

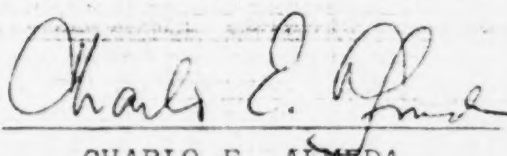
All the foregoing assigned errors, notably error no. 1, where petitioner has been classified a quota immigrant, when in truth

and in fact he is not, is a blatant mistake of law and of fact, a patent miscarriage of justice, a grave abuse of discretion, and the United States Court of Appeals, in affirming the trial Court decision without sufficient evidence to support the charge, deprives petitioner of life, liberty and due process of law in violation of the 5th Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted:



CHARLO E. ALMEDA
905 Bergen Avenue, Ste. 103
Jersey City, New Jersey 07306
(201) 656-1122

THE COURT: All right. The motion of the defendant for judgment of acquittal is denied.

The government has established a prima facie case by the testimony of its witnesses and by the documents entered into evidence.

The government has established sufficient evidence from which the jury could find beyond a reasonable doubt....

THE COURT: Yes, sir.

MR. ALMEDA: Number one, Your Honor, your illustration of the cup coming down. Can you also pick it up, fall down by accident from your hand? It can also fall down from accident, without any intention.

See, intention, it can also be -- it should not be by accident or any other innocent reason.

THE COURT: Every time I depart from the script, I run into trouble.

MR. ALMEDA: That's all. Because accident was mentioned in the intent as an exception.

THE COURT: Well, all right.

What do you have to say? Anything?

MRS. GILTENBOTH: I don't think it is necessary, Your Honor. I think it is

clear that you were describing the difference between direct and circumstantial evidence, and I think the jury understood that was the purpose of the illustration; and certainly the accident was brought to light by your mention of the lack of draft in the courtroom and the fact that it may not be rising up, and lack of intention.

THE COURT: I think it would be undue emphasis on that point. I believe that the jury understands. I think we would just unduly emphasize that illustration at this time.

Anything else?

MR. ALMEDA: That's it.

THE COURT: Okay.

(In open court.)

THE COURT: Do we have a Marshal here?

THE CLERK: They haven't appeared.

(Discussion off the record.)

THE COURT: I would now ask the original twelve if each of you is able and ready to begin deliberation. Does everyone feel all right and ready to deliberate?

THE COURT: We will recess.

(Proceeding recessed at 11:57 a.m.)

(Proceedings resumed in open court before the jury at 12:30 P.M. on May 14, 1982. Defendant was present with counsel.)

THE COURT: Members of the jury, we understand that you have arrived at a verdict.

THE FOREMAN: Yes, we have.

THE COURT: Would you hand the envelope to the Marshal, please?

Take the verdict.

THE CLERK: Members of the jury impaneled in the case of United States of America vs. Darfrente Tuason Nibungco, Jr., at No. 81-170 Criminal, you say you find the Defendant, Darfrente Tuason Nibungco, Jr., guilty. So say you all?

(Jurors indicated affirmatively.)

THE COURT: Members of the jury, that completes your service in this case.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,

v. CRIMINAL CASE NO. 81-170

DARFRENTE NIBUNGCO, JR.,
Defendant,

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the defendant above-named hereby appeals to the Honorable United States Court of Appeals for the Third Circuit from the judgment of conviction in the United States District Court for the Western District of Pennsylvania, Pittsburgh, Pennsylvania rendered on the 14th day of May 1982 convicting said defendant for violation of 18 United States Code, Section 1546 and from each and every intermediate order therein made.

CHARLO E. ALMEDA

CHARLO E. ALMEDA
Attorney For The Defendant
905 Bergen Avenue Ste. 103
Jersey City, New Jersey 07306

Dated: June 23, 1982
Jersey City, N. J. 07306

TO: 1. CLERK, UNITED STATES DISTRICT COURT for Western Pennsylvania
663 U.S. Post Office & Courthouse
P.O. Box 1805, Pittsburgh, Pa. 15219

2. JUDITH X. GILTENBOTH
Att. United States Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, PA. 15219

3. YAIER Y. LEHRER
Suite 1000, Manor Building
564 Forbes Ave., Pittsburgh, PA 15219

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 82-5387

UNITED STATES OF AMERICA

v.

DARFRENTE TUASON NIBUNGCO, JR.

Darfrente Nibungco, Jr., Appellant

(Criminal No. 81-170, W.D.Pa. - Pittsburgh)

Submitted Under Third Circuit Rule 12(6)
January 24, 1983

BEFORE: SEITZ, Chief Judge, ADAMS and GARTH, Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to wit, that the lower court erred (1) in failing to dismiss the indictment against the defendant since the government proceeded against the defendant

as a quota immigrant when in fact defendant was never assigned that status having never applied for an immigrant visa, (2) as a matter of law and found, contrary to the weight of evidence, that defendant unlawfully and fraudulently entered the United States on a visitor's visa as a non-immigrant, (3) in failing to find that defendant's omission of his his medical background from his visa application was immaterial and thus devoid of fraud or misrepresentation, (4) in failing to find that the position of salesman by defendant was the material fact, and (5) in refusing to instruct the jury as to exceptions and factors which would negate the intent element of the charge of fraudulent omission in defendant's visitor's visa application, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby

affirmed.

By the Court,

(SGD.) SERTZ
Chief Judge

ATTEST:

(SGD.) SALLY MRVOS,
Sally Mrvos, Clerk

DATED: Jan. 25, 1983

Certified as a true copy and issued in lieu of a formal mandate on March 3, 1983.

Test: (SGD.) M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5387

UNITED STATES OF AMERICA

v.

DARFRENTE TUASON NIBUNGCO, JR.

Darfrente Nibungco, Jr., Appellant

(Criminal No. 81-170, W.D.Pa. - Pittsburgh)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(SGD.) SEITZ

DATED: FEB. 23, 1983

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)
	)
v.	) Criminal No.8170
	) (18 U.S.C.,S1546
DARFRENTE TUASON NIBUNGCO, JR.	)

The Grand Jury Charges:

1. On or about August 5, 1979, in the Western District of Pennsylvania, at Pittsburgh, Pennsylvania, DARFRENTE TUASON NIBUNGCO JR., defendant herein, unlawfully and knowingly filed an application for extension of stay in the United States of America as a non-immigrant visitor, and, in so doing, used and attempted to use a visa and document which was required for entry into the United States of America and which he had knowingly, fraudulently and unlawfully procured by means of false claims and statements, to wit:

On or about July 6, 1979, at the American Consulate, Manila, Philippines, the

defendant applied for and unlawfully and knowingly obtained, accepted and received a non-immigrant visa by falsely claiming that he was a salesman with his highest completed education being a Bachelor of Science degree, that he wished to visit the United States of America for one-month and that based thereon, he was a non-immigrant when in truth and in fact as defendant well knew, he was a physician with a degree as a Medical Doctor, that he intended to obtain employment in the United States of America as a doctor and that based thereon at that time he, a native of the Philippines, was a quota immigrant who was not entitled to enter, be or remain in the United States of America under non-immigrant status.

In violation of 18 United States Code, Section 1546.

A True Bill,

(SGD.)
FOREMAN

(SGD.) J. ALAN JOHNSON
(T) J. ALAN JOHNSON
United States Attorney

Certified from the Record
Date Oct. 8, 1981
(SGD.)GILBERT W.TRONLEY
Clerk

A That's correct.

Q That's correct. If I don't make that application, even if I have the qualification as a doctor, I cannot enter the United States and I am not a quota immigrant. Am I right in saying that?

A Depending on the purpose.

Q No. Depending--Clarify.

Let me repeat that. If I am in the Philippines and I am a doctor, under your--under the third preference category, I am qualified to apply, but if I don't file an application, I am not a quota immigrant. Right or wrong?

A True.

Q True, I am not. I am not. Is that your answer?

A No. If you have not applied for an immigrant visa, no.

Q So now tell the jury approximately, is it on the second or third week that you had this serious discussion? Was it in the second or the third week?

A I believe that's the third week, I think.

Q The third week?

Q Thank you, Mr. Spoede. So it makes no difference normally with Immigration whether he is a lawyer, an engineer or a doctor. If he satisfies these requirements, normally it is approved by the Immigration and Consulate, assuming that he is not an approved immigrant applicant?

A No. Assuming he can prove to the Consular Officer that he intends to return to the Philippines...

Q And what were the requirements when the B-2 visa was issued at the time?

A Well, we have gone through this several times.

Q Yes. I want to hear it again.

A The requirements are in general first that the applicant must satisfy me that he has the intention and the means to visit the United States and return to the Philippines.

In detail, we asked for proof of ongoing employment, a good job to which to return, we looked for sufficient funds to carry out the visit...

Q But in making that decision, sir financial capacity is always a very important requirement?

A Yes. It is one of the major requirements.

November 14, 1980

UNITED STATES DEPARTMENT OF JUSTICE
Immigration & Naturalization Service
American Embassy
Roxas Blvd., Manila

ATTENTION: Mr. S. P. Philips
Officer-In-Charge

Gentlemen:

This has reference to your letter of October 28 on subject Dartrente Tuazon Nibungco (A22-618-569).

Checkings made with our branch offices and interviews conducted with some of our salesmen revealed that a certain Jun Nibungco did frequent our Sales office in between the dates mentioned in your letter. Subject, it turned out is a mere sub-agent or a bird-dog as one is commonly called in this trade. He deals directly with our regular sales representatives whenever he has prospective buyers of Toyota Motor Vehicles.

Being a sub-agent/bird-dog, all of his consummated sales are credited in the name of the regular salesmen he is dealing with and did not, in any way, gain any personality in the Sales Department.

As far as the Administrative Department is concerned, he never was, in any capacity, connected with Delta Motor Sales Corporation.

My direct line is 99-64-80. Please feel free to call me up if there are other matters you may wish to clarify regarding the subject.

Very truly yours,

GELDINO S. SANTOS
Administrative Manager

Republic of the Philippines)
City of Manila : SS
Embassy of the United States of America)

I, Alma J. Engel, Vice Consul of the United States of America at Manila Philippines, duly commissioned and qualified, do hereby certify that

Emilio C. Gamboa

Whose true signature and official seal are, respectively, subscribed and affixed to the (annexed) certificate (document), was on the 14th day of November, 1980, the date therefore, Administrative Manager, Delta Motor Sales Corporation Quezon City Republic of the Philippines whose official acts, faith and credit are due.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the American Consular Services at Manila, Philippines, this 10th day of December, 1980

Alma J. Engel
Vice Consul of the United States
of America